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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1134

DELBERT C. REIBERT, individually and on behalf of employees of the previously existing Sinclair Oil Corporation, the employees of Atlantic Richfield Company and employment agencies who provided temporary help for each corporation,

Petitioners,

v.

ATLANTIC RICHFIELD COMPANY
and
SINCLAIR OIL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS ATLANTIC RICHFIELD COMPANY AND SINCLAIR OIL CORPORATION IN OPPOSITION TO PETITION

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BRIEF FOR RESPONDENTS ATLANTIC RICHFIELD COMPANY AND SINCLAIR OIL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the court of appeals in *Reibert v. Atlantic Richfield Co.* is reported at 1973 Trade Cas. ¶ 74,298 (10th Cir.). The findings and recommendations of the magistrate

and the district court's order and judgment, all filed on March 20, 1972, are unreported but reproduced as Appendices B and C to the petition.

Counter-Statement of Statutes Involved

The only statutes involved in *Reibert v. Atlantic Richfield Co.*, are Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 4, 7 and 16 of the Clayton Act, 15 U.S.C. § § 15, 18 and 26. These statutes are set forth in Appendix J to the petition.

Counter-Statement of Question Presented

The only question presented for review in *Reibert v. Atlantic Richfield Co.* is whether a salaried research technician who claims to have been discharged as a result of the merger between Sinclair Oil Corporation ("Sinclair"), his former employer, and Atlantic Richfield Company ("ARCO") has standing under Sections 4 and 16 of the Clayton Act to complain that the merger had anticompetitive effects prohibited by Section 1 of the Sherman Act or Section 7 of the Clayton Act.

Counter-Statement of the Case

Petitioner Reibert's Statement of the Case is argumentative, and it contains allegations of disputed fact which go beyond the record. The only facts material to consideration of the question presented in *Reibert v. Atlantic Richfield Co.* are, however, undisputed, and a statement of these facts follows.

Reibert was employed by Sinclair from 1952 through March 4, 1969 when Sinclair was merged into ARCO (R. 81).[1] Originally employed as a draftsman, he subse-

1. Reference to "R. " are to the pages of the printed appendix submitted on the appeal to the Tenth Circuit. At petitioner's request this appendix has been certified to this Court in lieu of the original record on appeal.

quently held various other positions and was working as a research technician at the time of the merger (R. 82, 85). He continued in ARCO's employ in the same capacity following the merger. In June 1969, the research project on which Reibert was working was discontinued, and as a consequence, his employment was terminated in the winnowing of personnel which accompanied the post-merger reorganization of the combined research staffs (R. 20, 34; see R. 52, 89).

During the entire period of his employment with Sinclair and ARCO, Reibert's sole compensation was his salary which at the time of his termination was $870 per month (R. 20, 82). At no time was he paid commissions (R. 82). His employment was at all times terminable at will (R. 81, 143), and he had no interest or concern in the business of Sinclair or ARCO other than his employment for personal services (R. 143).

Reibert claims that the ARCO-Sinclair merger violated Section 1 of the Sherman Act ("Section 1") and Section 7 of the Clayton Act ("Section 7") in that allegedly it is in restraint of trade and its effect may be substantially to lessen competition, or to tend to create a monopoly, in the "petroleum (production and sales) line of commerce" (R. 19). He contends that he has standing under Sections 4 and 16 of the Clayton Act to challenge the merger by reason of the alleged injury he suffered when his employment was terminated (R. 20, 34).

On defendants' motion for summary judgment, the district court dismissed the complaint holding that Reibert lacked standing under Sections 4 and 16 of the Clayton Act to complain of alleged anticompetitive effects of the merger in the petroleum (production and sales) line of commerce (A. 16-20).[2] The Tenth Circuit affirmed.

2. References to "A. " are to the pages of the appendix to the petition.

REASONS FOR DENYING THE PETITION

The present case involves nothing more than the application of well-established rules of antitrust standing to a common factual situation. In affirming the district court's decision in the present case, the Tenth Circuit correctly followed numerous precedents stretching back sixty years. Its holding is not in conflict with holdings of this Court or any circuit, and this case presents no important question of federal law for resolution by this Court.

I.

THE TENTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH HOLDINGS OF THIS COURT OR ANY CIRCUIT.

A. The Well-Established Standing Rule

It has long been recognized that Sections 4 and 16 of the Clayton Act, which govern the right of private litigants to seek redress for violations of Section 1 and Section 7, do not grant standing to all those who may be affected by such violations. Standing is limited by the proximate cause rule embodied in the words "by reason of" in Section 4[3] and the word "by" in Section 16.[4] This proximate cause rule has two requirements. First, it requires a plaintiff to demonstrate that the anticompetitive effects of the alleged violation caused an injury to his competitive business position. Second, it requires a plaintiff to demon-

3. Section 4 provides in pertinent part as follows: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained * * *."

4. Section 16 provides in pertinent part as follows: "Any person * * * shall be entitled to sue for and have injunctive relief * * * against threatened loss or damage by a violation of the antitrust laws * * *."

strate that he was in the particular area of the competitive economy which Congress sought to protect by prohibiting such violations and, hence, that he suffered the direct impact of the anticompetitive effects.

This proximate cause limitation upon standing in private antitrust cases is universally accepted. The courts in all circuits recognize it and regularly apply it in varying factual settings.

First Circuit:

E.g., Robinson v. Stanley Home Prods., Inc., 178 F. Supp. 230, 233-34 (D. Mass.), *aff'd*, 272 F.2d 601 (1st Cir. 1959); *Miley v. John Hancock Mut. Life Ins. Co.*, 148 F. Supp. 299, 302-03 (D. Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U. S. 828 (1957); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956); *Corey v. Boston Ice Co.*, 207 F. 465, 466 (D. Mass. 1913).

Second Circuit:

E.g., GAF Corp. v. Circle Floor Co., 463 F.2d 753 (2d Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3410 (U.S. Jan. 12, 1973) (No. 72-984); *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U. S. 930 (1972); *Fields Prods., Inc. v. United Artists Corp.*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U. S. 949 (1971); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U. S. 923 (1971); *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166, 170-71 (2d Cir.), *cert. denied*, 395 U. S. 943 (1969); *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U. S. 936 (1956); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 113 F.2d 114 (2d Cir. 1940), *aff'g* 30 F. Supp. 389, 391 (S.D.N.Y. 1939).

Third Circuit:

E.g., Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 732-34 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Ash v. International Business Machs., Inc.*, 353 F.2d 491, 493-94 (3d Cir. 1965), *cert. denied*, 384 U.S. 927 (1966); *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956); *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312, 315-17 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954); *Loeb v. Eastman Kodak Co.*, 183 F. 704, 706, 709-10 (3d Cir. 1910).

Fourth Circuit:

E.g., South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 419 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).

Fifth Circuit:

E.g., Dailey v. Quality School Plan, Inc., 380 F.2d 484, 487-88 (5th Cir. 1967); *Martens v. Barrett*, 245 F.2d 844, 846 (5th Cir. 1957); *Peter v. Western Newspaper Union*, 200 F.2d 867, 872-73 (5th Cir. 1953); *Coast v. Hunt Oil Co.*, 195 F.2d 870, 872 (5th Cir.), *cert. denied*, 344 U.S. 836 (1952); *Centanni v. T. Smith & Son, Inc.*, 216 F. Supp. 330, 338 (E.D. La.), *aff'd per curiam*, 323 F.2d 363 (5th Cir. 1963).

Sixth Circuit:

E.g., Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

Seventh Circuit:

E.g., Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564, 566-67 (7th Cir.), *cert. denied sub nom. Illinois v. Commonwealth Edison Co.*, 375 U.S. 834 (1963).

Eighth Circuit:

E.g., Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679, 688-89 (8th Cir. 1966); *Duff v. Kansas City Star Co.*, 299 F.2d 320, 323 (8th Cir. 1962).

Ninth Circuit:

E.g., Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 10 (9th Cir. 1963); *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *Schatte v. International Alliance of Theatrical Stage Employees*, 182 F.2d 158, 167 (9th Cir.), *cert. denied*, 340 U.S. 827 (1950); *Contreras v. Grower Shipper Vegetable Ass'n of Central Calif.*, 1971 Trade Cas. ¶ 73,592 (N.D. Cal.); *Sargent v. National Broadcasting Co.*, 136 F. Supp. 560, 566 (N.D. Cal. 1955).

Tenth Circuit:

E.g., Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos., 382 F.2d 925 (10th Cir. 1967).

That this universally accepted limitation on standing precludes suit by a salaried employee based upon antitrust violations aimed at competition in his employer's market is firmly established by overwhelming authority. No fewer than 24 decisions, including holdings by the Second, Third, Fifth and Ninth Circuits, are in accord with this application of the standing limitation.

Holdings:

Centanni v. T. Smith & Son, Inc., 216 F.Supp. 330, 338 (E.D. La.), *aff'd per curiam*, 323 F.2d 363 (5th Cir. 1963); *Martens v. Barrett*, 245 F.2d 844, 846 (5th Cir. 1957); *Conference of Studio*

Unions v. Loew's Inc., 193 F.2d 51, 54 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *Schatte v. International Alliance of Theatrical Stage Employees*, 182 F.2d 158, 167 (9th Cir.), *cert. denied*, 340 U.S. 827 (1950); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 113 F.2d 114 (2d Cir. 1940), *aff'g* 30 F.Supp. 389, 391 (S.D.N.Y. 1939); *Loeb v. Eastman Kodak Co.*, 183 F. 704, 706, 709-10 (3d Cir. 1910); *J. O. Pollack Co. v. L. G. Balfour Co.*, 1973 Trade Cas. ¶ 74,339 at p. 93, 592 (N.D. Ill. 1972); *Deaktor v. Fox Grocery Co.*, 332 F.Supp. 536, 540-41 (W.D. Pa. 1971); *Bywater v. Matshushita Elec. Indus. Co.*, 1971 Trade Cas. ¶ 73,759 (S.D.N.Y.); *Contreras v. Grower Shipper Vegetable Ass'n of Central Calif.*, 1971 Trade Cas. ¶ 73,592 (N.D. Cal.); *Sargent v. National Broadcasting Co.*, 136 F.Supp. 560, 566 (N.D. Cal. 1955); *Walder v. Paramount Publix Corp.*, 132 F.Supp. 912, 916 (S.D.N.Y. 1955); *Gerli v. Silk Ass'n of America*, 36 F.2d 959, 960-61 (S.D.N.Y. 1929); *Corey v. Boston Ice Co.*, 207 F. 465, 466 (D. Mass. 1913).

Dicta:

Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295-96 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 487-88 (5th Cir. 1967); *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955); *Waldron v. British Petroleum Co.*, 231 F.Supp. 72, 84-85 (S.D.N.Y. 1964); *Schwartz v. Broadcast Music, Inc.*, 180 F.Supp. 322, 327-28 (S.D.N.Y. 1959); *Robinson v. Stanley Home Prods., Inc.*, 178 F.Supp. 230, 233 (D. Mass.), *aff'd*, 272 F.2d 601

(1st Cir. 1959); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F.Supp. 907, 909 (D. Mass. 1956); *Harrison v. Paramount Pictures, Inc.*, 115 F.Supp. 312, 317 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954).

B. Application of the Standing Rule to the Present Case

In the present case the Tenth Circuit held that Reibert failed to meet either of the two requirements of the proximate cause limitation on standing (*See* p. 5, *supra*).[5] This holding is manifestly correct. There is no causal relationship between Reibert's alleged injury and the alleged anticompetitive effects of the merger in the petroleum industry. Moreover, Reibert was not in the area of the competitive economy protected against the violation he alleges.

(1) Causal Relationship

It is not sufficient for a plaintiff challenging a merger under the antitrust laws to establish that he was injured as a result of an event which would not have occurred in the absence of the merger. He must show that his competitive business position was injured by the alleged anticompetitive effects. *E.g., GAF Corp. v. Circle Floor Co.*, 463 F.2d 752, 758-59 (2d Cir. 1792), *petition for cert. filed*, 41 U.S.L.W. 3410 (U.S. Jan. 12, 1973) (No. 72-984); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 54 (9th Cir. 1951),

5. In his statement of the case, Reibert states that the Tenth Circuit also concluded "that employment was not 'business or property' as these terms are used in Section 4 * * *." (Petition p. 9.) The Tenth Circuit, however, did not reach this issue. Instead it held that "In no way could his [Reibert's] job be construed as a venture or enterprise within the market area endangered by the merger." (A. 8). See discussion at pp. 10-11, *infra*.

cert. denied, 342 U.S. 919 (1952); *Peterson v. Borden Co.,* 50 F.2d 644, 646 (7th Cir. 1931); *Stokes Equip. Co. v. Otis Elevator Co.,* 1972 Trade Cas. ¶ 73,913 (E.D. Pa.); *Rayco Mfg. Co. v. Dunn,* 234 F.Supp. 593, 597 (N.D. Ill. 1964). Thus, in the *GAF Corp.* case, the Second Circuit summarized the principle underlying numerous decisions which have denied standing where this causal nexus was absent. It stated:

> "• • • The general proposition underlying cases such as these is that only a person whose competitive business position was harmed by the *anticompetitive* effects of the alleged restraint of trade can maintain a treble damage action." (463 F.2d at 758-59. (Emphasis in original.))

Reibert contends that the ARCO-Sinclair merger was illegal because it lessened competition in the competitive market (petroleum production and sales) in which the merger partners operated (R. 19). He also contends that he was injured by *the merger* because the decision to terminate his employment would not have been made in the absence of the merger (*See* Petition pp. 7-8, 17-18). Clearly, this alleged injury is not the result of any anticompetitive effect, but rather what the Tenth Circuit called "the natural effect flowing from the two similarly structured businesses combining to maximize efficiency." (A. 11.) The "injury" would have occurred whether or not the merger violated the antitrust laws, and the required nexus between the anticompetitive effect and the injury is lacking.

(2) Protected Area of Economy

But even assuming *arguendo* that Reibert could demonstrate a causal relationship between anticompetitive effect and injury, he nevertheless lacks standing because he was not within the area of the competitive economy protected against the violation he alleged.

Congress enacted Section 1 and Section 7 to protect commercial competition in the marketing of goods and services.

E.g., Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962); *Northern Pac. Ry. v. United States,* 356 U.S. 1, 4-5 (1950); *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 492-93 & n.15 (1940). Reibert argues that this protection of competition was intended to produce incidental beneficial effects in other areas, such as the promotion of full employment (*See* Petition pp. 18-24). But whatever its incidental purposes might have been, Congress focused its scheme of protection on redressing anticompetitive effects in the market place. And, consistent with this focus, the courts have long confined the protection of these laws to the participants in the market which is the target area of the prohibited conduct. *E.g., Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.,* 454 F.2d 1292, 1295-96 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972); *Billy Baxter, Inc. v. Coca-Cola Co.,* 431 F.2d 183, 187 (2d Cir. (1970), *cert. denied,* 401 U.S. 923 (1971); *Conference of Studio Unions v. Loew's Inc.,* 193 F.2d 51, 54 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952).

In the *Conference of Studio Unions* case, for example, the court held that employees lacked standing to complain that their employers were engaged in a conspiracy to restrain trade in the production of motion pictures because the employees were not "within that area of the economy which is endangered by a breakdown of competitive conditions" in the motion picture production industry. 193 F.2d at 54-55. Similarly, the antitrust violation alleged by Reibert would have its direct anticompetitive impact in the petroleum market, and Reibert is not a participant in that market. Any injury he suffers as a result of that impact must necessarily be indirect, through some relationship with a participant in that market. The Tenth Circuit correctly determined that such an injury would be outside the scope of the protection afforded by the antitrust laws.

C. The Asserted Conflicts

Reibert asserts in his petition that the Tenth Circuit's holding in the present case conflicts with holdings of other circuits and of this Court. This assertion is entirely without foundation.

Contrary to Reibert's suggestion (Petition p. 14), the Tenth Circuit's holding in no way conflicts with this Court's decision in *Hawaii v. Standard Oil Co. of Calif.*, 405 U.S. 251 (1972). The only holding in *Hawaii* was that a state could not maintain an action under Section 4 as *parens patriae* to recover damages for injury to its economy. *Id.* at 252-53. And, far from extending antitrust standing to all those who can trace an injury to a violation, this Court recognized that its decision denied Hawaii redress for a remote injury caused by an antitrust violation, *see id.* at 264, and justified this result by reference to the same long standing authorities which required the dismissal of Reibert's complaint. This Court stated:

> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. [Citing one case from each circuit]"[6] (*Id.* at 263 n. 14)

Clearly, *Hawaii* does not conflict with the decision below.

Nor is there any merit to Reibert's suggestion (Petition p. 15) that *Radovich v. National Football League*, 352 U. S. 445 (1957), and *Flood v. Kuhn*, 407 U. S. 258 (1972), present a conflict. These were not standing cases, but rather involved the question whether the antitrust laws applied to professional sports. Moreover, unlike Reibert, the plaintiffs in these cases were not persons who suffered

6. The cases cited in support of this statement are included among those cited at pp. 5-7, *supra*.

incidental remote injuries. They were the very targets of the violations alleged.

Equally without substance is Reibert's rejection (Petition pp. 15-16) of the clear distinction between salaried employees and individual entrepreneurs in order to contrive a conflict with *Perkins v. Standard Oil Co. of Calif.*, 395 U. S. 642 (1969); *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967); *Roseland v. Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942).

Perkins involved an individual entrepreneur who operated in the threatened market both directly and through wholly-owned corporate shells. As this Court stated,

> "• • • Perkins was no mere innocent bystander; he was the principal victim of the price discrimination practiced by Standard. • • • [H]e was *directly* injured • • •." (395 U. S. at 649-50 (Emphasis added.) *See also GAF Corp. v. Circle Floor Co.*, 463 F.2d 753, 758 (2d Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3410 (U. S. Jan. 12, 1973) (No. 72-984).)

The plaintiffs in the other cases were commission sales agents who had developed their own territories and were, in effect, joint venturers in the competitive market with the companies whose products they sold. Their situation is far different from that of Reibert, a salaried research technician, who was in no sense a participant in the threatened market. Unlike the plaintiffs in these cases, Reibert did not suffer the direct impact of the anticompetitive effects he has alleged.

The petition fails, therefore, to demonstrate any conflict between the Tenth Circuit's holding in the present case and any holding of any other circuit or of this Court.

II.

THE TENTH CIRCUIT'S HOLDING PRESENTS NO IMPORTANT QUESTION OF ANTITRUST LAW

The present case presents no important question of federal law for resolution by this Court. As demonstrated above, the Tenth Circuit's holding is a routine application of the well-established antitrust standing rule. There is no more reason to review this application of the rule than the eighteen previous applications where the unsuccessful party sought review by this Court. In 15 of these cases, standing had been denied. In all of them certiorari was denied.

> *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U. S. 930 (1972); *Kaufman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U. S. 974 (1971); *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U. S. 923 (1971); *Fields Prods., Inc. v. United Artists Corp.*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U. S. 949 (1971); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U. S. 923 (1971); *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U. S. 943 (1969); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U. S. 934 (1966); *Ash v. International Business Machs., Inc.*, 353 F.2d 491 (3d Cir. 1965), *cert. denied*, 384 U. S. 927 (1966); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U. S. 880 (1964); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F.2d 564 (7th Cir.), *cert. denied sub nom. Illinois v. Commonwealth Edison Co.*, 375 U. S.

834 (1963); *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U. S. 907 (1963); *Miley v. John Hancock Mut. Life Ins. Co.*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U. S. 828 (1957); *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U. S. 890 (1956); *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U. S. 936 (1956); *Harrison v. Paramount Pictures, Inc.* 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U. S. 828 (1954); *Coast v. Hunt Oil Co.*, 195 F.2d 870 (5th Cir.), *cert. denied*, 344 U. S. 836 (1952); *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U. S. 919 (1952); *Schatte v. International Alliance of Theatrical Stage Employees*, 182 F.2d 158 (9th Cir.), *cert. denied*, 340 U. S. 827 (1950).

The rule applied in the present case and its many predecessors does not frustrate vigorous antitrust enforcement. Rather, it prevents the flood of private antitrust suits which would otherwise engulf the federal courts, removes the concomitant risk of multiple recoveries for the same injury, and brings a vital element of precision to antitrust law. As the Second Circuit stated:

> "A line which limits standing to those against whom the antitrust violation is directed fulfills Congress' fundamental purpose and at the same time establishes a reasonable and easily identifiable cut-off that avoids the unfortunate consequences of opening the flood-gate to all, no matter how remote their interest or incidental their relationship. Competitors who are within the target area of an alleged antitrust conspiracy usually have more incentive than others to avail themselves of § 4. In those cases where they fail to do so, the Government may, of course, seek injunctive or punitive relief under other sections of

> the antitrust laws. See, e.g., 15 U.S.C.§§ 1, 2, 4, 9." (*Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1296 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). (Footnote omitted.))

Moreover, in view of the fact that for more than sixty years this rule has been consistently applied to preclude suit by those remotely or incidentally injured by antitrust violations, it must be regarded as having the tacit approval of Congress. *E.g., Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos.*, 382 F.2d 925, 929 (10th Cir. 1967); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F.Supp. 907, 909 (D. Mass. 1956). Any departure from this rule would, therefore, be a matter for legislative rather than judicial initiative. *See, e.g., Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972); *id.* at 286 (Burger, C. J., concurring).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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